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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 368

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 87–102) is reported in 64 F. Supp. 303.

JURISDICTION

The judgment of the Court of Claims was entered on February 4, 1946 (R. 103). A motion for new trial was denied on May 6, 1946 (R. 103). The petition for a writ of certiorari was filed on August 5, 1946. The jurisdiction of this Court is invoked under section 3 (a) of the Act of February 13, 1923, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether the Act of March 2, 1889, 25 Stat. 888, required the United States to bear the cost

of supplying the allottees under section 8 with the benefits provided in section 17 of the Act.

STATUTE INVOLVED

The pertinent provisions of the Act of March 2, 1889, 25 Stat. 888, are set forth in the Statement.

STATEMENT

Petitioner filed this suit to recover the amount due for lands ceded to the United States under section 21 of the Act of March 2, 1889, 25 Stat. 888, 896 (R. 1–15). On December 7, 1942, the Court of Claims found that, as the United States conceded, it had received 9,261,592.62 acres under the cession and that petitioner was entitled to a credit of $5,307,655.87 (R. 18–32), 97 C. Cls. 391. It added (R. 23):

> But that fact, in itself, does not create even a *prima facie* liability on the part of the defendant in this suit. The defendant could perform its duty under the agreement as well by expending the money for plaintiff as by holding it for plaintiff.

Accordingly, it remanded the cause for further proceedings. The United States submitted a report prepared by the General Accounting Office. The report embraced all transactions between the United States and the petitioner down to June 30, 1925. Upon the basis of this report, the court made findings of fact (R. 34–86) which contained, *inter alia,* an account summary showing the various credits due petitioner and the expen-

ditures chargeable against those credits during the period covered by the report (Fdg. 9 (a), R. 47). It concluded as a matter of law that the petition should be dismissed (R. 87) and entered judgment accordingly (R. 103).

Petitioner concedes (p. 3) that certain of the expenditures were properly chargeable against it. It asserts, however, that the court below erred in holding it was chargeable with the sum of $8,427,329.54[1] expended by the United States during the fiscal years 1893 through 1925 for the benefit of allottees pursuant to section 17 of the Act of March 2, 1889, 25 Stat. 888, 894 (Fdg. 15 (b), R. 65–66). The findings pertinent to this holding are as follows:

The Great Sioux Reservation was created by Article II of the Treaty of 1868, 15 Stat. 635. It was reduced in size by Article 1 of the Agreement of 1876, which was ratified by the Act of February 28, 1877, 19 Stat. 254 (R. 75). It was further diminished by the Act of March 2, 1889, the statute directly involved here. Having been accepted by the Indians, the latter Act was made effective on February 10, 1890, by proclamation of the President, 26 Stat. 1554 (R. 74). Section 21 of

[1] Petitioner states (see, e. g., pp. 3, 4, 6, 18) that these expenditures amount to $8,438,038.38, and cites as authority therefor Fdg. 9 (a) (R. 47). That finding refers to Fdg. 15 (b) (R. 65–66). The latter finding shows that, when petitioner is credited with an expenditure for this purpose which was made from its own funds, the amount is no more than $8,427,329.54, as above stated.

the Act divested petitioner of all land which was outside the boundaries of six reservations created by section 1 to 6 thereof and, with exceptions not here material, restored such land to the public domain.

Section 8 dealt with the newly created reservations. It empowered the President to cause them to be surveyed and allotted in severalty to the Indians resident thereon. It provided that, if sufficient land were available, each head of a family should be allotted 320 acres; each single person over 18, 160 acres; each orphan child under 18, 160 acres; and each other person under 18 then living or who might be born prior to the date of the order directing an allotment, 80 acres.

Section 17 directed that each head of family or single person over 18 who should take an allotment under section 8 should be provided with certain livestock, tools, seeds and cash. And for this purpose, it appropriated so much money as might be necessary. The section further provided that:

> * * * there shall be set apart, out of any money in the Treasury not otherwise appropriated, the sum of three millions of dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund * * *

Provision was made for crediting the permanent fund with interest at the rate of five percent per annum and for the use of the interest by the

Secretary of the Interior for the benefit of the Indians receiving rations and annuities upon the reservations created by sections 1 to 6 in proportion to the numbers receiving rations and annuities at time the Act took effect. Finally, section 17 provided:

> * * * That after the Government has been reimbursed for the money expended for said Indians under the provisions of this act, the Secretary of the Interior may, in his discretion, expend, in addition to the interest of the permanent fund, not to exceed ten per centum per annum of the principal of said fund in the employment of farmers and in the purchase of agricultural implements, teams, seeds, including reasonable cash payments per capita, and other articles necessary to assist them in agricultural pursuits, and he shall report to Congress in detail each year his doings hereunder. And at the end of fifty years from the passage of this act, said fund shall be expended for the purpose of promoting education, civilization, and self-support among said Indians, or otherwise distributed among them as Congress shall from time to time thereafter determine.

Section 21, pursuant to which the cession was made, also provided that the lands restored to the public domain should be disposed of to actual settlers under the homestead laws. It specified the prices to be paid by settlers and declared:

> *Provided:* That all lands herein opened to settlement under this act remaining un-

> disposed of at the end of ten years from the taking effect of this act [February 10, 1890] shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund * * *.

Section 22 provided:

> That all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States and be applied solely as follows: First, to the reimbursement of the United States for all necessary actual expenditures contemplated and provided for under the provisions of this act, and the creation of the permanent fund hereinbefore provided; and after such reimbursement to the increase of said permanent fund for the purposes hereinbefore provided.

Thus, the Act of March 2, 1889, contemplated that at the end of the ten-year period, i. e., as of February 10, 1900, there would be a settlement between the United States and the petitioner with respect to the amount due on account of the ceded lands and the $3,000,000.00 permanent fund. But the United States never set up this account. No part of the $5,307,655.87 due on account of the ceded lands was added to the permanent fund (R. 38–39). Nor was the United States reimbursed for the $3,000,000.00 appropriated by section 17 (R. 41).

The Act also contemplated that during the ten-

year period expenditures for allottees pursuant to section 17 would be made out of Treasury appropriations, but that, at the end of such period, appropriations for this purpose would cease (R. 45, 61). And at that time amounts which had been appropriated were to be paid back from the proceeds of the disposed lands (R. 45, 61). However, thereafter Congress continued to make appropriations for payments to allottees.[2] Thus, as of June 30, 1925 (the end of the period covered by the Comptroller General's report), allotments had been made to 29,693 members of petitioner tribe, 15,517 of whom had received benefit payments (R. 64). These payments out of public appropriations amounted to $8,427,329.54 (R. 65–66).

ARGUMENT

The court below held that the petitioner was chargeable with expenditures made by the United States in supplying the allottees with the benefits

[2] In addition, after the ten-year period, Congress enacted other legislation in respect of Sioux allotments and payments of benefits to Sioux allottees: It authorized the Secretary of the Interior to issue to an allottee, in lieu of the milch cows, mares and implements provided for in section 17 of the Act of March 2, 1889, "an equal value in good stock cattle." Act of June 21, 1906, 34 Stat. 325, 326. It authorized the Secretary to make allotments pursuant to the 1889 Act to any living children of the Sioux Tribe who had not been allotted lands. Sec. 19, Act of May 29, 1908, 35 Stat. 444, 451. And, when the Comptroller General ruled that such allottees were not entitled to the payments provided in section 17, it directed the Secretary to allow them such payments. Act of May 21, 1928, 45 Stat. 684 (R. 63–64).

specified in section 17 (R. 96–99). The holding was clearly correct.

1. The basic error of petitioner's contrary contention is that it fails adequately to distinguish between the two appropriations authorized by section 17. The first appropriation (see p. 4, *supra*) was made for the purpose of providing funds for the expenditures to allottees. The section does not specify the method by which these expenditures are to be repaid. The second appropriation was made for the purpose of setting up in the Treasury a permanent fund to the credit of petitioner. The uses to which this fund was to be put were specified (see p. 5, *supra*). Since no provision was made for using it to make expenditures for allottees or to reimburse the Government for such expenditures, the latter fund clearly could not be used for either of these purposes.

This consideration, taken in conjunction with section 22 of the Act, leads inevitably to the conclusion that Congress intended that expenditures for allottees were chargeable to petitioner. Section 22 provides:

> That all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States and be applied solely as follows: *First,* to the reimbursement of the United States for all necessary actual expenditures

> contemplated and provided for under the provisions of this act, and the creation of the permanent fund hereinbefore provided; and *after such reimbursement* to the increase of said permanent fund hereinbefore provided. [Italics added.]

The purpose of section 22, clear on its face, was that expenditures contemplated and provided for under the Act should be chargeable against the money accruing from the disposal of lands. Inasmuch as the expenditures for allottees were provided for under section 17, the court below rightly charged them against the sum due petitioner from cession of its lands.

In the light of this difference in the character and purpose of the two appropriations, the fallacy in petitioner's argument is evident. Thus, its contention (pp. 18–20) that the existence of the two appropriations indicates that expenditures for allottees are not to be reimbursed is based on the unfounded assumption that the permanent fund could have been used for these expenditures. Petitioner's further arguments in reliance upon the administrative action in charging such expenditures to the first appropriation rather than to the permanent fund (pp. 4, 31–32) and upon congressional recognition of this administrative practice (pp. 32–36) are equally unsound. They might have some weight if the administrative authorities had set up an account covering moneys accruing from disposal of lands

and nonetheless had charged these expenditures against the appropriation. But the administrative action which was in fact taken carried no implication that these expenditures were not to be applied in accordance with section 22 if and when there should be an accounting of the money due for the lands.

2. The other aids to construction relied upon by petitioner do not help its case. The suggestion that a "motive" existed of making a gift of the expenditures (pp. 20–23) is pure speculation unsupported by fact. Equally without support in the record is the supposition that the Indians might have rejected the Act if they had understood the expenditures were to be repaid (p. 28). As a matter of fact, the commissioners sent to the Indians for the purpose of explaining the Act and procuring their acceptance correctly explained the part of the Act here involved. Thus, as petitioner concedes (pp. 28–29), it was made plain to the Indians of the Santee Agency that the benefits to be paid would "come out of the proceeds of the sale of the lands" (R. 214–215). The Indians at Standing Rock Reservation were not, as petitioner supposes (pp. 29–30), advised otherwise. They were told that the money for the purchase of the cows, horses and agricultural implements was *not* "to come from the $3,000,000 that was to be set aside as a fund in the Treasury, as soon as the treaty is ratified" (R. 275). This statement was correct. As the commissioner im-

mediately added: "The $3,000,000 is set aside only for the purposes mentioned in this bill." Here, petitioner has again lost sight of the restrictions placed upon the use of the permanent fund.[3] Petitioner fails to cite the explanation made to the Indians of the Cheyenne Agency. They were told (R. 248):

> * * * Now, as I told you the other day, we do not know how good these lands are or how much money they will bring, but we guess that it will bring about $8,000,000. Now, as soon as you accept this act the Government places to your credit $3,000,000 at 5 per cent. interest. * * * Now, the schools that are provided for in section 17 are to be paid for by the Government, and not out of your money.
>
> The rations and annuities provided for in the treaty of 1876 are paid for by the Government and not out of your money. Now, when the Government gets the $8,000,000—if it gets it, it will take out of that $8,000,000 the $3,000,000 that it first puts to your credit. *It takes out also what it pays for cows and mares and agricultural implements, and what is left is added to the $3,000,000 that was first set apart for the Indians.* * * * [Italics added.]

Clearly, therefore, the court below was amply

[3] The same error is responsible for another assertion (pp. 30–31) to the effect that, had the commissioners realized the permanent fund was subject to these expenditures for allottees, they would not have approved of its distribution on a per capital basis.

supported by the record in finding that the "Indians understood and agreed when they signed the agreement that the articles and payments to be furnished and made under sec. 17 would be paid for out of the proceeds from the ceded land" (R. 99; and see R. 61, 97).

3. There is no merit in petitioner's contention that the decision is inconsistent with *Sioux Tribe* v. *United States,* 89 C. Cls. 31, 38, where it was held that petitioner could not sue for alleged breach of undertakings under the Treaty of 1868, 15 Stat. 635, to furnish articles to individual Indians. The present decision does not set off the cost of performing the undertakings involved in the earlier case. Rather, as has been shown, it gives effect to an obligation which was expressly imposed upon petitioner by section 22 of the Act of March 2, 1889.

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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